Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

CUCAMONGANS UNITED FOR REASONABLE EXPANSION ("CURE"), a Non-profit Unincorporated Association; THOMAS BRADFORD; MARILYN SUE BRADFORD; LEO ORVANANOS; SHIRLEY ORVANANOS,

Petitioners,

versus

CITY OF RANCHO CUCAMONGA; BRAD BULLER, an Individual, in His Individual and Official Capacity; THOMAS GRAHN, an Individual, in his Individual and Official Capacity,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MALISSA HATHAWAY MCKEITH
LOEB & LOEB LLP
1000 Wilshire Blvd
Suite 1800
Los Angeles, CA 90017
(213) 688-3460

MARINA TRAMONTOZZI
Counsel of Record
Suite 601-S
815 15th Street, N.W.
Washington, D.C. 20005
(202) 393-1070

LARRY D. SANDERS
SIERRA DEFENSE PROJECT
c/o SYRCL
P.O. Box 841
Nevada City, CA 95959
(530) 265-5961

DENNIS P. DERRICK
Of Counsel
Seven Winthrop Street
Essex, MA 01929
(978)768-6610

Attorneys for Petitioners

39pp

QUESTIONS PRESENTED.

I. WAS IT ERROR TO ABSTAIN FROM DECIDING THE PETITIONERS' DUE PROCESS CLAIMS UNDER 42 U.S.C. SECTION 1983 FOR A FAIR HEARING WHEN CALIFORNIA'S STATUTORY AND MUNICIPAL LAW UNAMBIGUOUSLY RECOGNIZES THEIR PROPERTY RIGHT TO PARTICIPATE IN A TENTATIVE MAP APPROVAL PROCESS FOR A SUBDIVISION BUT THEN UNAMBIGUOUSLY DENIES THEM ANY OPPORTUNITY TO ASSERT FOR AS LONG AS TEN YEARS AFTER APPROVAL OF THE TENTATIVE MAP EMERGENT PUBLIC HEALTH AND SAFETY CONCERNS BASED UPON NEW KNOWLEDGE AND NEW SCIENCE WHICH CALLS INTO QUESTION THE INTEGRITY OF THE ASSUMPTIONS RELIED UPON BY THE CITY IN 1990 TO CONCLUDE THAT THE SUBDIVISION WAS SAFE?

II. DOES THAT PART OF CALIFORNIA'S SUBDIVISION MAP ACT WHICH DENIES THE PETITIONERS FOR AS LONG AS TEN YEARS AFTER THE CITY'S APPROVAL OF A TENTATIVE SUBDIVISION MAP ANY OPPORTUNITY FOR A HEARING TO ASSERT EMERGENT PUBLIC HEALTH AND SAFETY ISSUES BASED UPON NEW KNOWLEDGE AND NEW SCIENCE CALLING INTO QUESTION THE SAFETY OF THE PROJECT DEPRIVE THEM OF THEIR DUE PROCESS RIGHT TO A HEARING ON THESE ISSUES AT A MEANINGFUL TIME AND IN A MEANINGFUL MANNER?

III. EVEN IF THE DISTRICT COURT'S ABSTENTION WERE APPROPRIATE, WAS CERTIFICATION BY THE COURT OF APPEALS TO THE CALIFORNIA SUPREME COURT OF THE QUESTION OF THE PETITIONERS' RIGHTS IN THE CIRCUMSTANCES THE MOST EXPEDITIOUS AND FAIR METHOD OF RESOLVING THEIR CLAIMS IN TIME TO DO THEM ANY GOOD?

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The opinion of the United States Court of Appeals for the Ninth Circuit in *Cucamongans United for Reasonable Expansion ("CURE") et al. v. City of Rancho Cucamonga et al.*, 2000 US App. Lexis 954 (9th Cir. 1/21/00), is set forth in the Appendix hereto (App. 1a).

The Memorandum of Decision of the District Court for the Central District of California in *Cucamongans United for Reasonable Expansion ("CURE") et al. v. City of Rancho Cucamonga et al.*, is unreported and set forth in the Appendix hereto (App.7a).

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Ninth Circuit affirming the decision of the District Court of the Central District of California was entered on January 21, 2000 (App. 7a-12a). This petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. Section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution, Amendment XIV, Section 1:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Civil Rights Act–42 U.S.C. Section 1983:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Section 66452.6 of California's Subdivision Map Act:

> (a)An approved or conditionally approved tentative map shall expire 24 months after its approval or conditional approval, or after any additional period of time as may be prescribed by local ordinance, not to exceed an additional 12 months. However, if the subdivider is

> required to expend one hundred twenty-five thousand dollars ($125,000) or more to construct, improve, or finance the construction or improvement of public improvements outside the property boundaries of the tentative map...which are reasonably related to the development of that property, each filing of a final map authorized by Section 66456.1 shall extend the expiration of the approved or conditionally approved tentative map by 36 months from the date its expiration, as provided in this section, or the date of the previously filed final map, whichever is later. The extensions shall not extend the tentative map more than ten years from its approval or conditional approval....

Section 65033 of California's Government Code:

> The Legislature recognizes the importance of public participation at every level of the planning process. It is therefore the policy of the state and the intent of the Legislature that each state, regional, and local agency concerned in the planning process involve the public through public hearings, informative meetings, publicity and other means available to them, and that at such hearings and other public forums, the public be afforded the opportunity to respond to clearly defined alternative objectives, policies, and actions.

Section 65090 of California's Government Code:

(a) When a provision of this title requires notice of a public hearing to be given pursuant to this section, notice shall be published pursuant to Section 661 in at least one newspaper of general circulation within the jurisdiction of the local agency which is conducting the proceeding at least 10 days prior to the hearing....
(b) The notice shall include the information specified in Section 65094.
(c)In addition to the notice required by this section, a local agency may give notice of the hearing in any other manner it deems necessary or desirable.

Section 65091 of California's Government Code:

(a) When a provision of this title require notice of a public hearing to be given pursuant to this section, notice shall be given in all of the following ways:

...

(3) Notice of the hearing shall be mailed or delivered at least ten days prior to the hearing to all owners of real property as shown on the latest equalized assessment roll within 300 feet of the real property that is the subject of the hearing....

Section 65103 of California's Government Code:

> Each planning agency shall perform all of the following functions:
>
> ....
>
> (d) Endeavor to promote public interest in, comment on, and understanding of the general plan, and regulations relating to it.

Section 65961 of California's Government Code:

> Notwithstanding any other provision of law, upon approval or conditional approval of a tentative map for a subdivision of single- or multiple-family residential units..., during the five year period following recordation of the final map or parcel map for the subdivision, a city...shall not require as a condition of the issuance of any building permit...for such...residential units, conformance with or performance of any conditions that the city...could have lawfully imposed as a to the previously approved tentative or parcel map....
>
> However, the provisions of this section shall not prohibit a city...from doing any of the following:
>
> (a) Imposing conditions or requirements upon the issuance of a building permit...which could have been lawfully imposed as a condition to the approval of a tentative or parcel map if the local agency finds it necessary to impose the condition or requirement for any of the following reasons:
>
> > (1) A failure to do so would place the residents of the subdivision or of the immediate community, or both, in a condition perilous to their health or safety....

Section 16.16.170 of the Ordinances for the City of Rancho Cucamonga:

Extensions. A. Request by Sub-divider.
The sub-divider or his representative may request an extension of the expiration date of the approved or conditionally approved tentative subdivision map by written application to the community development department. The application shall be filed not less than sixty days before the map is to expire, and shall state the reasons for requesting the extension.
B. City Planner Action. The city planner may extend the approval of a tentative tract map if he finds that there has been no significant changes in the general plan land use element, development code or other applicable specific/community plan, character of the area within which the map is located, or current planning policy or past practice that would cause the approved plan to become inconsistent or nonconforming. If the city planner finds that there is significant change, [he] shall refer the extension request to the planning commission for consideration.
C. Time Limit of Extension. Extensions may be granted for a period or periods not exceeding a total of three years.
D. Conditions of Approval. As a condition of the extension of a tentative tract map, after conducting a public hearing, the city planner or planning commission, may impose new conditions or revise existing conditions on the approved tentative as they find necessary.
All public hearing notice requirements of the State Subdivision Map Act shall apply.

....

G. Findings. The granting of an extension shall require all of the following findings to be made by the approving body:

....

3. The extension of the tentative map is not likely to cause public health or safety problems;

4. The extension is within the time limits prescribed by state law and local ordinance.

Unless all of the above findings are made by the approving body, the requested extension shall be denied.

Appellate Rule 29.5(a) of the California Rules of Court

> (a)The California Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth, provided that:
>
> (1) the certifying court request the answer;
>
> (2) the questions may be determinative of a cause pending in the certifying court; and
>
> (3) the decisions of the California appellate courts provide no controlling precedent concerning the certified question.

STATEMENT OF THE CASE.

Cucamongans United for Reasonable Expansion ("CURE"), a non-profit unincorporated association, together with the other individually named Petitioners (collectively referred to as ("CURE") are comprised of homeowners who live adjacent to and in the immediate vicinity of a 26-acre parcel of land located at the base of the San Bernandino Mountains in the Respondent City of Rancho Cucamonga (the City").

In November of 1990, with minimal public input, the City approved a co-called negative declaration and a tentative

map authorizing the subdivision of the parcel into forty (40) single-family residential lots. Under the California Environmental Quality Act, a negative declaration is appropriate only if there will be no significant environmental impact resulting from a project. The City's decision permitted, among other things, the removal of a 30-feet-high, 2,000-feet-long levee and a swale system which was certified by the Federal Emergency Management Agency to withstand a 100-year flood event and to protect downslope homes, including those owned by CURE's members, from unusually heavy rainfall, flooding and debris flow.

In order to compensate for the levee's removal and to provide for the safety of those living in the downslope homes, the City conditioned its approval of the tentative map upon the construction of a debris basin to the north of the development. But experts who have later looked at the project declared the debris basin to be undersized based upon **new** standards of the U.S. Army Corps of Engineers. Moreover, the debris basin is built upon an earthquake fault with a **revised** magnitude of 7.0-7.5.

In 1992, 1993, 1995 and 1996, the City approved extensions of the tentative subdivision map, each time failing to provide notice or a hearing for the public in general or for those immediately affected by the project. Some of these extensions by the City were otherwise irregular on their face and did not comport with the City's procedure for tentative map extensions delineated in its Ordinance 16.16.170.

In the Spring of 1997, the current developer (Lauren Development) applied to the City for design review of the forty homes it proposed to build on the approved subdivision. CURE then learned of this project for the first time on or about May 23, 1997. On July 2, 1997, it brought this civil action in the District Court for the Central District of California alleging most of the facts already recited herein and asserting violations of the Civil Rights Act and seeking declaratory and injunctive relief as well as monetary damages against the City and its planning director and associate

planner.

The gist of CURE's civil rights claim was that the City's failure to provide proper notice and a hearing concerning any of its four successive grants of extension to this tentative subdivision map denied its members due process. As CURE alleged, had the City provided the process that was due it under the federal constitution, CURE would have had the opportunity to adduce evidence, newly emergent since the time when the tentative map was first approved in 1990, which called into question the safety and integrity of the flood infrastructure relied upon by the City in 1990 to conclude that the project was then safe. CURE claimed that with notice and a hearing, it would have had a fair opportunity to persuade the City's planner or its planning com-mission that the project's replacement of a 100-year flood levee and swale system with an inadequate debris basin to the north of the development was unsafe, a threat to public health and good reason to deny the extension. There was also new information concerning the magnitude of a major earthquake fault paralleling the project site which rendered the flood infrastructure fundamentally unsafe and a threat to the public living downslope.

CURE thus claimed that if it had been allowed to present this new evidence to the City at the time of the tentative map extensions, the City would have been required under relevant law to deny the extension upon safety and public health grounds or, if CURE's position was not sustained, it would have had the opportunity to seek judicial review of the City's decision. But without knowledge of the extensions, with no notice being given by the City and no hearing being held, CURE faced an already concluded decision-making process with no meaningful opportunity to subject the City's determination to judicial or administrative scrutiny in time to do it any good. Its members thus live within the danger zone of a project founded upon stale and even obsolete assumptions about flood infrastructure and earthquake exposure; and these down-slope residents have

been denied any role in having this new information and new science factored into a reasoned decision by the City whether to extend this tentative subdivision map.

Following the amendment of CURE's complaint, the City moved to dismiss it or, in the alternative, to abstain from hearing CURE's claims for relief. On December 12, 1997, the District Judge dismissed three counts of CURE's amended complaint and abstained from hearing its remaining claim that it had been deprived of its civil rights under 42 U.S.C. Section 1983 when the City repeatedly failed to provide it with notice of or a hearing on the issue of whether the tentative map for this 40-home subdivision should be extended. (App.7a-12a).

Relying upon this Court's decision in *Railroad Comm'n. of Tex. v. Pullman Co.*, 312 U.S. 496 (1941), the District Court reasoned that the land use issues implicated in this case constitute a "sensitive area of social policy" which federal courts should avoid. (App. at 4a). It also determined that a state court pronouncement that CURE, as adjoining landowners to the project, has no protected property interest under state law to notice and an opportunity to be heard concerning tentative map extensions would obviate the need to resolve any constitutional question since CURE "will be unable to assert a violation of due process." (App. at 10a-11a).

Finally, the District Judge thought that while affected landowners are entitled to notice and an opportunity to be heard whenever the **approval** of a tentative subdivision map substantially interferes with their property rights, (*Id.* citing *Horn v. County of Ventura*, 24 Cal. 3d 605, 616; 596 P.2d 1134(1979)), extending an approved tentative subdivision map has no more than a "de minimis effect " impact upon the affected land and cannot invoke the kind of due process protections CURE seeks here. (*Id.*). Citing *El Patio v. Permanent Rent Control Board of Santa Monica*, 110 Cal. App. 915, 928(1980), the lower court concluded that the Subdivision Map Act permits extensions as to time only, an

insufficient factor to create a right in CURE worth protect-in with due process guarantees.(*Id.*).

On appeal from this ruling to the United States Court of Appeals for the Ninth Circuit, CURE argued that the third prong of the criteria set down by this Court in *Pullman* for abstention had not been satisfied because state of the law in California, both statutory and decisional, is unambiguous that adjoining landowners such as CURE have a protected property interest even in the decisionmaking process to extend a tentative subdivision map where the substantial passage of time itself (here seven to eight years) renders stale and even obsolete the fundamental assumptions which led the City to approve the tentative subdivision map in the first place.

That is, the successive decisions by the City from 1992 through 1996 to extend this 1990 tract map despite new emergent evidence that the project as originally conceived is dangerous to those in the immediate vicinity and a threat to both public health and safety is more than a "de minimis effect" on the property of adjoining landowners. It's a direct threat to the health of their families, the safety of their environs and their property values. CURE accordingly argued that as a matter of due process it was entitled to notice and an opportunity to be heard on such extension requests so that it could adduce probative proof that the original assumptions about flood infrastructure and earthquake exposure had been overtaken by new knowledge and new science which were critical to an informed **current** decision about whether to extend the tentative map.

But even if state law concerning adjacent landowners' rights in this extension process was sufficiently unclear to warrant abstention, CURE asked the Court of Appeals to certify the question directly to the California Supreme Court, an option which would provide an expedited review of its rights in the circumstances and avoid a costly and time-consuming journey through the state court system only to receive the same ruling available through certification.

On January 21, 2000, Court of Appeals issued its decision affirming the District Judge in all respects.(App.1a-5a). It first ruled that all three prongs of *Pullman's* criteria had been satisfied and that abstention was appropriate. (App. at 3a-5a). As to the uncertainty of California law concerning the rights of adjacent landowners in the tentative map extension process, the court noted the limited reach of *Horn v. County of Ventura*, 24 Cal. 3d 605, 616; 596 P.2d 1134(1979), a decision recognizing the right to notice and a hearing for affected landowners but only in the map **approval** process. (App. at 4a-5a). Because no decisional law had extended *Horn* beyond its original holding, the court of appeals could not predict "with any confidence" how California's Supreme Court would decide the issue. (*Id.*)

Turning to CURE's request for certification, the court denied the request but gave no definitive reasons for doing so. (App. at 5a).

CURE has duly filed its petition for writ of certiorari within ninety days of the entry of this ruling. *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 445-446(1974). *FTC v.Colgate-Palmolive Co.*, 380 U.S. 374, 384(1965). *United States v. Healey*, 376 U.S. 75, 77-78; 80(1964).

REASONS FOR GRANTING THE WRIT.

I. THE DECISION BELOW MISAPPLIES *PULLMAN*'S THIRD CRITERIA FOR ABSTENTION AND WRONGLY INTERPRETS CALIFORNIA LAW WHICH UNAMBIGUOUSLY RECOGNIZES THE RIGHT OF ADJACENT LANDOWNERS TO NOTICE AND A HEARING DURING THE TENTATIVE MAP EXTENSION PROCESS IN ORDER TO ADDUCE EVIDENCE ON THE SAFETY AND PUBLIC HEALTH ISSUES ASSOCIATED WITH THE EXTENSION.

In *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716(1996), this Court acknowledged that federal courts have a strict duty to exercise the jurisdiction they were given by Congress. *Id.* As it observed in *Wisconsin v. Constantineau*, 400 U.S. 433, 437-438 (1971), Congress could have routed all federal constitutional questions through the state court systems, saving to this Court the final say when it comes to the review of state court judgments. *Id.* But the first Congress did not do that and instead created a federal system of courts which are empowered to hear *inter alia* claims concerning federal constitutional rights and claims created by federal civil rights legislation. *Id.*

This Court has repeatedly recognized that the federal courts have a "virtually unflagging obligation ...to exercise [this] jurisdiction given them." *Quackenbush,* 517 U.S. at 716. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 821(1976). *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411, 415(1964). *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40(1909). *Cohens v. Virginia*, 19 U.S. 264(1821).

It has held, however, that federal courts may decline to exercise their jurisdiction in otherwise "exceptional circumstances," e.g., where denying litigants a federal forum would clearly serve an important countervailing interest as

when abstention is warranted by principles of proper constitutional adjudication, regard for federal-state relations or "wise judicial administration." See *Colorado River*, 424 U.S. at 813 quoting *County of Allegheny v. Frank Mushada Co.*, 360 U.S. 185,189(1959).

In *Railroad Comm'n. of Tex. v. Pullman Co.*, 312 U.S. 496(1941), this Court recognized that a federal district court is vested with discretion to decline to exercise or to postpone the exercise of its jurisdiction in deference to a state court resolution of underlying issues of state law. In *Pullman*, an authoritative resolution of a complex state law question might have ended the litigation and have avoided any federal constitutional claim at all. *Id.* at 501. The Court therefore directed the District Judge to retain the suit pending a determination by the state court of the underlying state law question. See also *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1971).

Importantly, however, the *Pullman* abstention doctrine only applies where "the issue of state law is uncertain." *Wisconsin v. Constantineau*, 400 U.S. at 438 quoting *Harman v. Forssenius*, 380 U.S. 528, 534 (1965). Thus this Court has approved of abstention where unresolved questions of state law are enmeshed with federal constitutional claims and these questions of state law are so uncertain that only a state tribunal can resolve them. *Reetz v. Bozanich*, 397 U.S. 82 (1970). *City of Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639(1959). But if the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, "it is the duty of the federal court to exercise its properly invoked jurisdiction." *Harman v. Forssenius*, 380 U.S. at 534-535 quoting *Baggett v. Bullitt*, 377 U.S. 360, 375-379 (1964). See *Kusper v. Pontikes*, 414 U. S. 51, 54-55(1973); *Lindsey v. Normet*, 405 U.S. 56, 63 n.4 (1972).

The beginning of any analysis of CURE's property

interests which invoke due process protection under the Fourteenth Amendment and 42 U.S.C. Section 1983 depends upon whether those asserted property interests are defined or created by state law or even by city ordinance. *Goss v. Lopez*, 419 U.S. 565, 572-573(1975). *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). *Canfield v. Sullivan*, 774 F.2d 1466, 1467(9th Cir. 1985)("Whether [plaintiff] possessed a protectible property interest...is defined by reference to state law, including city ordinances.").In making such an analysis, this Court has held that attention should be paid not only to the "weight" of the interest at stake but also to the nature of the interest affected. *Board of Regents v. Roth*, 408 U. S. at 570-571. As long as property deprivation is not *de minimis*, its gravity is irrelevant to the question of whether account must be taken of the Due Process Clause. *Snaidach Family Finance Corp.*, 395 U.S. 337, 342(1969). *Boddie v. Connecticut*, 401 U.S. 371 378-379 (1971).

With this in mind, California's statutory law as well the City's ordinance addressing tentative map extensions unambiguously and clearly establish that landowners adjacent to pro-posed developments have the protected property right to notice and a hearing in order to assert their viewpoint concerning the safety and public health concerns attendant not only to the initial approval of a tentative map of a proposed subdivision which affects their respective homes but also to any successive extensions of that tentative map where the passage of time has caused public safety and health assumptions supporting the initial approval to become stale or even obsolete, perhaps dangerously so. No other conclusion comports with a common sense reading of California law.

In the first place, Section 65033 of the state's Government Code recognizes the importance of public participation "**at every stage** of the planning process" and declares that California's policy and the Legislature's intent is that the City involve the public through public hearings,

informative meetings, publicity and other means to engage interested parties and provide them with an "opportunity to respond to clearly defined alternative objectives, policies and actions." To further this end, Section 65103 of the Code requires the City to promote public interest in the general plan of development within its borders and Section 65090 prescribes the kind of notice of a public hearing which the City should provide. Importantly, Section 65091 requires that the City give notice to landowners within 300 feet of the proposed development described by the tentative map.

In the second place, the City's own ordinance addressing the extension of tentative maps provides that one of the required findings its city planner or planning commission must make for granting such an extension is that the extension "is not likely to cause public health and safety problems." Moreover, Section 65961 of the state's Government Code gives the City the power to attach conditions to an already approved tentative subdivision map upon its recordation as a final map if a "failure to do so would place the residents of the subdivision **or of the immediate community , or both**, in a condition perilous to their health or safety...."

Just as importantly, the Legislature has enacted Section 66498.1 of the Subdivision Map Act which applies to vesting tentative maps, a process which affords the developer far more protection against intervening changes in ordinances and regulations than ordinary tentative maps. Even here, the City may disapprove an **extension** of such vesting tentative maps if it determines that *inter alia* "a failure to do so would place the residents of the subdivision **or the immediate community, or both**, in a condition dangerous to their health or safety, or both...."

All this statutory law together with the City's own ordinance addressing the granting of extensions of tentative maps recognize that the vital issues of public safety and health for the immediate community continue to be viable property interests even after initial approval of a tentative

subdivision map. It does not take a quantum leap of logic to imply from this impressive legislative and municipal concern for the continuing health and safety of the community while these stale tentative maps, be they vesting or ordinary, are granted extensions that the very persons living within the areas affected by the project are best equipped and most interested in furthering these values during the extension period by open debate in a hearing of some kind.

But due process is only satisfied when those faced with the threatened loss of property associated the extension of a tentative map are given a meaningful opportunity to voice their legitimate concerns about safety and health issues in a meaningful manner. *Matthews v. Eldridge*, 424 U.S. 319, 333(1976). After all, this Court has emphasized that due process is "flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334. See *Reynolds v. Cochran*, 365 U.S. 525, 530-531(1961). Notice and a hearing incident to the initial approval of a tentative map cannot satisfy these due process requirements when the passage of time, here seven to eight years, has rendered the information prompting that initial approval possibly irrelevant and perhaps made the project dangerous to those living near it.

In these circumstances, CURE's continuing property interest in maintaining the safety and health of its neighbors and its neighborhood throughout any tentative map extension process, as reflected in California's statutes and the City's municipal ordinance, requires that they be given notice and a hearing concerning any tentative map extension process so that it will have a meaningful opportunity to address the health and safety issues associated therewith.

Because it is crystal clear that the California courts would not come to any different conclusion about CURE's protected property interests at stake here which might avoid in whole or in part the recognition of the federal constitutional rights put in issue by its pleadings or materially change the nature of the problem it has raised on this record,

abstention under *Pullman's* rationale was not warranted . *Harman, supra. Harrison v. NAACP*, 360 U.S.. 167, 177(1959). See *New Motor Vehicle Board of California v. Orrin W, Fox Co.*, 439 U.S. 96, 100(1978).

In addition, it is just as clear that Section 66452.6 of the Subdivision Map Act provides that extensions of the tentative map shall not exceed ten (10) years from its approval or conditional approval. Moreover, like the statutory provisions in *Wisconsin v. Constantineau, supra*, where abstention was not warranted, this statute contains no requirement whatsoever for notice or hearing at any point along this potentially ten-year period when a tentative map can be extended so that adjacent landowners can renew, update or supplement safety or health issues associated with the project which may have emerged through new knowledge or new science since the time the tentative map was first approved. Indeed, a California appellate court has held in *El Patio v. Permanent Rent Control board of Santa Monica,* 110 Cal. App. 3d 915, 928 (1980), that the tentative map extension process described in Section 66452.6 permits only extensions of time, not further input on safety or health issues by adjacent landowners.

Thus California law is unmistakably clear that Section 66452.6 of the Subdivision Map Act on its face requires neither notice nor a hearing for adjoining landowners while the extension process, lasting as long as ten years, endures. As applied to CURE's allegations, this statute has deprived them of due process while the tentative map was repeatedly extended on a project first approved in 1990. There is no uncertainty about the reach of Section 66452.6 and there are no provisions contained therein which could fairly be taken to mean that notice and hearing might be provided under some circumstances but not others. *Wisconsin v. Constantineau, supra.*

"Hence the naked question, uncomplicated by unresolved state law, is whether [this portion of the Subdivision Map Act] on its face [or as applied] is unconstitutional" for

depriving CURE of procedural due process. *Id.* at 438.

As this Court observed in *Zwickler v. Koota,* 389 U.S. 241, 251(1967), abstention should not be ordered merely to await an attempt to vindicate a claim founded upon federal rights in state court. Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional question. *Id.* at 250-251. "We would negate the history of the enlargement of the jurisdiction of the federal district courts if we held the federal court should stay its hand and not decide the question before the state court decided it."*Wisconsin v. Constantineau, supra.*

Because the statutory law of California and the City's municipal law have unmistakably recognized a protected property interest in adjacent landowners to assert their safety and health concerns attendant to the tentative map extension process at a meaningful time and in a meaningful manner and since Section 66452.6 of the Subdivision Map Act does not provide that due process at any point along a ten-year extension process or, in this case, at any point over a span of seven to eight years when the factual basis which led to the approval of the development in the first place has become not only stale but obsolete, abstention from deciding CURE's federal claim was wrong and should be reversed by this Court. The matter should be remanded to the District Court for a trial on the merits of CURE's amended complaint which *inter alia* raises the question of the constitutionality of Section 66452.6 on its face and as applied to the facts here.

II. THE COURT OF APPEALS DECISION REFUSING TO CERTIFY THE QUESTION OF CURE'S PROTECTED PROPERTY RIGHTS IN THE CIRCUMSTANCES OF THIS CASE IS NOT SUPPORTED BY THE DECISIONAL LAW OF THIS COURT.

Without explanation, the court of appeals refused to certify to the California Supreme Court the question of CURE's protected interest in participating in the tentative map extension process. At the very least, the delay engendered by abstention should have prompted the court of appeals to certify the question.

This Court has consistently expressed a preference for certification over abstention in order to ameliorate the delay and expense to which abstention under *Pullman* inevitably gives rise. *Bellotti v. Baird*, 428 U.S. 132, 150-151(1976). *Lehman Brothers v. Schein*, 416 U.S. 386, 390-391(1974). It also provides the litigants with the assurance of gaining an authoritative ruling on a possibly dispositive state law issue. *Id.*

By refusing to certify the question of CURE's right to go forward under state law, the court of appeals has relegated CURE to an expensive and time-consuming journey through the state court system to seek the same answer from the California Supreme Court which it could have obtained by certification; and it loses valuable time in attempting to challenge a project which is founded upon stale if not obsolete assumptions about flood infrastructure and earthquake exposure. This result is at odds with the decisions of this Court and works against a fair and expeditious resolution of this litigation solely to the detriment of CURE.

Accordingly, at the very least, this Court should reverse the court of appeals' decision refusing to certify and order that the question of CURE's protected property rights in the circum-stances of this case be certified to the California Supreme Court for determination.

CONCLUSION.

For all of the reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit and, ultimately, to vacate and reverse the abstention order below and remand the matter to the District Court for trial; or, in the alternative, to order certification to the California Supreme Court of the question of CURE's protected property rights in the circumstances of this case.

Respectfully submitted,

Malissa Hathaway McKeith
LOEB & LOEB LLP
1000 Wilshire Blvd., Suite 1800
Los Angeles, CA 90017
(213)688-3460

Dennis P. Derrick
Seven Winthrop Street
Essex, MA 01929
(978)768-6610

Marina Tramontozzi
Counsel of Record
815 15th Street, N.W.
Suite 601
Washington, D.C. 20005
(202) 393-1070

(Any footnotes trail end of each document)

No. 98-55262

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CUCAMONGANS UNITED FOR REASONABLE EXPANSION ("CURE"), a Non-profit Unincorporated Association; THOMAS BRADFORD; MARILYN SUE BRADFORD; LEO ORVANANOS; SHIRLEY ORVANANOS,
Plaintiffs-Appellants,

v.

CITY OF RANCHO CUCAMONGA; BRAD BULLER, an Individual, in His Individual and Official Capacity; THOMAS GRAHN, an Individual, in his Individual and Official Capacity,
Defendants-Appellees.

January 4, 2000, Argued and Submitted, Pasadena, California

January 21, 2000, Filed

COUNSEL:
For CUCAMONGANS UNITED FOR REASONABLE EXPANSION ("CURE"), THOMAS BRADFORD, MARILYN SUE BRADFORD, LEO ORVANANOS,

SHIRLEY ORVANANOS, Plaintiffs - Appellants: Malissa Hathaway McKeith, LOEB & LOEB, Los Angeles, CA.

For CUCAMONGANS UNITED FOR REASONABLE EXPANSION ("CURE"), Plaintiff - Appellant: Eric Berliner, BERLINER LAW OFFICES, Nevada City, CA.

For CUCAMONGANS UNITED FOR REASONABLE EXPANSION ("CURE"), THOMAS BRADFORD, MARILYN SUE BRADFORD, LEO ORVANANOS, SHIRLEY ORVANANOS, Plaintiffs - Appellants: Lawrence D. Sanders, BERLINER LAW OFFICES, Nevada City, CA.

For CITY OF RANCHO CUCAMONGA, BRAD BULLER, THOMAS GRAHN, Defendants - Appellees: Steven H. Kaufman, RICHARDS, WATSON & GERSHOM, Los Angeles, CA.

JUDGES:
Before: TROTT, W. FLETCHER, Circuit Judges, and MOLLOY, District Judge. n2

n2 The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

OPINION:

MEMORANDUM[1]

Cucamongans United for Reasonable Expansion ("CURE"), Thomas and Marilyn Sue Bradford (the "Bradfords"), and Shirley and Leo Orvananos (the "Orvananoses") (collectively "CURE et al.") appeal an order of the district court granting the City of Rancho Cucamonga's

("City") motion to abstain pursuant to *Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941),* which allows a federal court to abstain in certain cases where state law is doubtful. CURE et al. argue that we should reverse the district court's decision to abstain because the pertinent state law issue was not doubtful. Alternatively, CURE et al. request that we certify the question of state law to the California Supreme Court. We have jurisdiction pursuant to *28 U.S.C. § 1291,* and we AFFIRM the district court and DENY the request for certification.

Because the parties are familiar with the facts of this case, they will not be recited here.

DISCUSSION

A. Pullman Abstention

We review a district court's decision to abstain under Pullman for an abuse of discretion. *C-Y Dev. Co. v. City of Redlands, 703 F.2d 375, 377 (9th Cir. 1983).* We must determine whether the district court exercised its discretion "within the narrow and specific limits prescribed by the particular abstention doctrine involved. " Id. (citing *Pue v. Sillas, 632 F.2d 74, 78 (9th Cir. 1980)).*

CURE et al. argue that the district court abused its discretion in abstaining because the requirements for Pullman abstention were not satisfied. In Pullman, the Supreme Court held that a federal court should abstain from deciding a case when state law is uncertain, and a state court's clarification of state law might make a federal court's constitutional ruling unnecessary. *Pullman, 312 U.S. at 501-02.* Thus, Pullman abstention is appropriate when:

> (1) The complaint touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open;

(2) Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy; and

(3) The possibly determinative issue of state law is doubtful.

Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401, 409 (9th Cir. 1996). In this case, the district court held that all three prongs of the Pullman test were satisfied.

After reviewing the record, we hold that all three prongs of the Pullman test, as construed by this Circuit, were satisfied and, therefore, the district court properly abstained. The first prong of the Pullman test was satisfied because this case involves land use planning and "land use planning is a sensitive area of social policy that meets the first requirement for Pullman abstention." See *San Remo Hotel v. City & County of San Francisco, 145 F.3d 1095, 1105 (9th Cir. 1998); Sinclair, 96 F.3d at 409.* The second prong of the Pullman test was satisfied because if a state court determines that CURE et al. have no protected property interest entitling them to notice and an opportunity to be heard, CURE et al. cannot assert a due process claim, thus eliminating the constitutional question presented here. See *Sinclair, 96 F.3d at 409.*

Finally, the third prong of the Pullman test was satisfied because the answer to the question whether CURE et al. have a protected property interest under state law is not clear. See *Sinclair, 96 F.3d at 409.* In *Horn v. County of Ventura, 24 Cal. 3d 605, 156 Cal. Rptr. 718, 596 P.2d 1134 (1979),* the California Supreme Court held that "whenever approval of a tentative subdivision map will constitute a substantial or significant deprivation of the property rights of other landowners, the affected persons are entitled to a reasonable

notice and an opportunity to be heard before the approval occurs." *Id. at 616.* However, the California courts have not extended the decision in Horn beyond tentative map approval to tentative map extension, which is the issue in this case. As such, we cannot "predict with any confidence how the state's highest court would decide" this issue. See *Pearl Inv. Co. v. City & County of San Francisco, 774 F.2d 1460, 1465 (9th Cir. 1985).*

Accordingly, we hold that because all three prongs of the Pullman test were satisfied, the district court properly exercised its discretion in abstaining in this case. We therefore AFFIRM the district court.

B. Certification

Alternatively, CURE et al. argue that this court should certify the question of state law to the California Supreme Court pursuant to California Rules of Court 29.5[3] ("Rule 29.5"). CURE et al. contend that certification is appropriate in this case because it is preferable to Pullman abstention as it "in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism." See *Bellotti v. Baird, 428 U.S. 132, 150-51, 49 L. Ed. 2d 844, 96 S. Ct. 2857 (1976).*

The decision whether to certify a question of state law to a state supreme court rests in the sound discretion of the federal court. See *Lehman Bros. v. Schein, 416 U.S. 386, 391, 40 L. Ed. 2d 215, 94 S. Ct. 1741 (1974).* After reviewing the briefs, record, and relevant law in this case, we conclude that certification to the California Supreme Court is not appropriate. Accordingly, we DENY CURE et al.'s request to certify the question of state law pursuant to Rule 29.5.

AFFIRMED.

n1 This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

n3 Rule 29.5 provides that the California Supreme Court may answer a certified question if three requirements are met: (1) the certifying court requests the answer; (2) the question may be determinative of a cause pending in the certifying court; and (3) the decisions of the California appellate courts provide no controlling precedent concerning the certified question.

No.98 55262

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CUCAMONGANS UNITED FOR REASONABLE EXPANSION ("CURE"), a Non-profit Unincorporated Association; THOMAS BRADFORD; MARILYN SUE BRADFORD; LEO ORVANANOS; SHIRLEY ORVANANOS,
Plaintiffs,

v.

CITY OF RANCHO CUCAMONGA; BRAD BULLER, an Individual, in His Individual and Official Capacity; THOMAS GRAHN, an Individual, in his Individual and Official Capacity,
Defendants.

December 12, 1997, Filed

This matter comes before the court on defendant's motion to dismiss and/or abstain. The court has fully considered the briefs, supporting papers, oral argument, and supplemental briefing pertaining to this matter. we rule as follows: . .

I. Violation of 42 U.S.C. Sec. 1983 .

Under the Pullman doctrine, federal, courts should abstain in cases where a constitutional question could be avoided or narrowed by a ruling on an uncertain question of state law. Pearl Inv. Co. v. City and Cty. of San Francisco, 774 F.2d 1460, 1463 (9th Cir. 1985). Pullman abstention is justified where: 1) the complaint 'touches a sensitive area of social policy" into which the federal courts ought not enter;

2) constitutional adjudication can be avoided by a decision on the state law issue: arid 3) the potentially determinative state law issue is doubtful. Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401, 409 (9th Cir. 1996) (citing Pearl, 774 F.2d at 1463)

The elements for abstention are satisfied here. "[L]and use planning is a sensitive area of social policy that meets the first requirement 'for Pullman abstention." Id. (quoting Kollsman v. City of Los Angeles, 737 F.2d 830, 833 (9thCir. 1984)).

The second Pullman requirement is met where the resolution of a state law issue will "obviate, in whole or in part, or alter the nature of the federal constitutional questions " C-Y Development Co v. City of Redlands, 703 F.2d 375, 379 (9th Cir. 1983) (citations omitted) . A section 1983 claim based on a violation of procedural due process must allege a property interest protected by the Fourteenth Amendment's Due Process Clause. See Portman v. County of Santa Clara, 995 F.2d 898, 904 (9th Cir. 1993). Protected property interests are created and defined by state law. Lap ham v. California Energy Resources Conservation and Dev. Comm'n, 705 F.2d 358, 360 (9th Cir. 1983) (quoting Goss v. Lopez, 419 U.S. 565, 572—73 (1975)) A state Court determination that plaintiffs, as adjoining property owners, have no protected property interest under state law entitling them to notice and an opportunity to be heard regarding the tentative tract map extensions,, will eliminate the constitutional question presented here as plaintiffs will be unable to assert a violation of due process. It is immaterial that plaintiff's complaint expressly raises only federal issues where, as here, resolution of the state law question will avoid the constitutional issue. See id.

Finally, it is not clear that plaintiffs have a relevant protectible property interest The California Supreme Court has held that "whenever approval of a tentative' subdivision map will constitute a substantial or significant deprivation of the property rights of other landowners, the affected persons are entitled to a reasonable notice and an opportunity to be heard before the approval. occurs." Horn' v County of

Ventura, 24 Cal., 3d 605, 616 (1979.) . The court emphasized, however, that constitutional notice and hearing requirements are not triggered "by agency decisions having only a de minimis effect on land." Id.

The parties have not cited, nor has 'the court found, any California case extending Horn beyond the context of tentative map approvals to map extensions like those challenged here[1] We cannot conclude with certainty that a decision extending a pre-existing approved tentative map has more than a mere "de minimis effect" on plaintiffs' property.' Indeed, the Subdivision Map Act has been interpreted to "permit[] an extension only as to 'time '" El Patio v Permanent Rent Control Board of Santa Monica, 110 Cal. App. 3d 915, 928 (1980) .

Based on the foregoing, Pullman abstention is appropriate here. Defendant's motion to abstain is GRANTED.

II. Violation of 42 U.S.C. Sec.1985

Section 1985(3) provides:

> If two or more persons in any State or Territory conspire . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ..: . , the party so injured or deprived may have an action for the recovery of damages,

> occasioned by such injury or deprivation, against any one or more of the conspirators.

In Griffin v. Breckenridge, 403 U.S. 88 (1971), the Supreme Court held that 1985(3) extends beyond state action and reaches purely private conspiracies. See United Brotherhood of Carpenters & Joiners of America, Local 610, AFL—CIO v. Scott, 463 U.S. 825 (1983). In so holding, Griffin emphasized that 1985(3) cannot be applied as a "general federal tort law" because the statute requires a plaintiff to allege "some racial, or perhaps otherwise class—based, invidiously discriminatory animus behind the conspirators' action." Griffin, 403 U.S. at 102.

The court acknowledges a split of authority on the question of whether the class—based, discriminatory animus requirement applies to claims of conspiracy under color of state law like that presented here See e.g., Selzer v Berkowitz, 459 F Supp 347, 351-52 (E D.N Y. 1978) (holding that the Griffin requirement does not apply to governmental conspiracies). Absent controlling precedent from the Ninth Circuit, we think the better view is that adopted by the majority of courts that have directly addressed the issue These courts find that class-based discriminatory animus is required for all claims of conspiracy under § 1985(3), whether private or under color of state law. See, e.g., Gagliardi v. Village of Pawling, 188 F.3d 188 (2d Cir. 1994); Munson v. Friske, 754 F.2d 683 (7th Cir. 1985); Kraft v. Jacka, 669 F. Supp. 333 (D. Nev. 1987) ("The law in this circuit is clearly that class—based animus is an element of a §1985 claim where state action is alleged." (citations omitted)); Stevens v. Rifkin, 608 F. Supp. 710 (N.D. Cal. 1984).

Plaintiffs do not allege that defendants' actions are class— based or motivated discriminatory animus. Thus, they do not state a claim under § 1985.. Defendant's motion to dismiss the § 1985 claim is GRANTED.

III. Violation of the Fourteenth Amendment

Plaintiffs concede that they cannot state a claim directly under the Constitution. See Azul-Pacifico, Inc., v.

City of Los Angeles, 973, F.2d 704, 705 (9th Cir. 1992) . Defendant's motion to dismiss the constitutional claim is GRANTED.

IV. Violation of Cal. Civ.Code 6256

A district court may exercise supplemental jurisdiction over state law claims when the federal and state claims "form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. S 1367(a). Supplemental jurisdiction, is proper where the state and federal claims arise from a "common nucleus of operative facts" such that a plaintiff would ordinarily be expected to try them all in a single judicial proceeding. United Mine Workers v Gibbs, 383 U.S. 715, 725 (1966); Lyon v Whisman, 45 F.3d 758, 760 (3d Cir. 1995)

Plaintiffs' federal claim under section 1983 is based on defendants' failure to 'provide notice and an opportunity to be heard when they extended the tentative tract map in 1992, 1993, 1995, and 1996. The state claim for violation of the California Public Records Act is based on an entirely separate set of actions and events, i.e. defendants' failure to produce public documents requested by plaintiffs since plaintiffs became aware of the development in May, 1997.

Since the two claims do not arise from a "common nucleus of operative facts," we lack jurisdiction over the state law claim. Accordingly, defendants' motion to dismiss this claim is GRANTED.

V. Conclusion

In light of our rulings, only plaintiffs' claim under section 1983 remains. This.matter is STAYED pending resolution in state court of the uncertain determinative state law question noted herein. The clerk is directed to administratively close this case pending resolution of proceedings in the state, courts.

IT IS SO ORDERED

[fn1]Plaintiffs do not challenge the approval of the original tentative map Plaintiff's Opposition, 8:26-28 n 5